BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MOHAMED D. MOHAMED	)	
Claimant	)	
VS.	)	Docket Nos. 1,045,757
	)	& 1,045,758
TYSON FRESH MEATS, INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant appealed the February 19, 2014, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on July 15, 2014, in Lenexa, Kansas.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Carolyn M. McCarthy of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties stipulated the only issue on appeal is claimant's request in Docket No. 1,045,758 that respondent pay as authorized medical benefits $25,030.97 in medical expenses stemming from his July 25, 2009, emergency room visit at St. Catherine Hospital in Garden City and transportation to and treatment at Via Christi Regional Medical Center St. Francis Campus in Wichita.

ISSUES

On May 21, 2009, claimant filed two claims for work-related injuries: one resulting from a "series to 07/21/08"[1] in Docket No. 1,045,758 and another resulting from a "series to on or about 03/16/07 and through 02/16/09"[2] in Docket No. 1,045,757. Claimant subsequently filed amended applications for hearing in Docket No. 1,045,757. Although

[1] Application for Hearing, Docket No. 1,045,758 (filed May 21, 2009).

[2] Application for Hearing, Docket No. 1,045,757 (filed May 21, 2009).

the Award was entered in both claims, claimant's application for review was filed only in Docket No. 1,045,758. The Board considers both claims appealed. However, the parties have limited their appeal to the single issue in Docket No. 1,045,758 as set forth below.

The payment of outstanding medical expenses of $25,030.97 is the only issue on this appeal. ALJ Fuller found:

> Based on all the evidence and testimony presented, it is found that the claimant was largely at fault in the delay of his medical care, he was less than cooperative. He was aware in early June that he was having a lot of pain and was considering going to an emergency room, yet between then and his actual trip to an emergency room, the claimant failed to attend scheduled appointments or had them rescheduled on more than one occasion. Further, the claimant was informed that going to an emergency room would not be authorized nor would it be paid for. Prior to going to the emergency room, the claimant did not attempt to obtain authorization or any other assistance for his symptoms. He did not attempt to contact the respondent. The claimant's request for payment of outstanding medical bills as authorized is denied.[3]

Claimant requests the aforementioned medical expenses be paid by respondent as authorized medical benefits. Respondent argues the treatment for which claimant is seeking payment was unauthorized.

The only issue before the Board is:

Should respondent be required to pay claimant's outstanding medical expenses in the amount of $25,030.97?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

The parties stipulated claimant met with personal injury by accident on July 21, 2008, and February 6, 2009. Claimant is from Somalia, where his education was limited to the eighth grade. An interpreter was required at the regular hearing, at which time claimant introduced medical bills totaling $25,030.97 from several medical providers. Those medical expenses resulted from transportation to and a visit to the emergency room at St. Catherine Hospital in Garden City on July 25, 2009; transportation from St. Catherine by air ambulance to Via Christi Regional Medical Center in Wichita and medical treatment at Via Christi.

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[3] ALJ Award at 10.

At the regular hearing, a series of emails between claimant's former counsel, Beth Regier Foerster,[4] and Wendel W. Wurst, respondent's former attorney, were introduced. An email dated June 4, 2009, from Ms. Foerster to Mr. Wurst requested medical treatment for claimant. The email indicated claimant had been treated by Dr. Terry Hunsberger and was scheduled to see Dr. Baughman on April 1, 2009, but could not because claimant had to attend a child support hearing in Minneapolis, Minnesota. Dr. Hunsberger's records were not placed into evidence. The email indicated claimant felt as if he needed to go to an emergency room. In a reply email, Mr. Wurst wanted to know why claimant missed his appointment with Dr. Baughman and indicated an emergency room visit would not be authorized.

An email dated June 12, 2009, from Kelle Sanfilippo[5] to Ms. Forester indicated claimant was scheduled to see Dr. Hunsberger on June 15, 2009. Claimant did not keep the appointment with Dr. Hunsberger. On cross-examination at the regular hearing, claimant indicated he did not refuse to see Dr. Hunsberger, but he refused to see Dr. Baughman.

Respondent and claimant agreed that claimant would choose a treating physician from three names provided by respondent. Claimant chose Dr. Robert Eyster and an appointment was scheduled for July 9, 2009, but was canceled because Dr. Eyster's office mistakenly scheduled claimant for an independent medical evaluation instead of evaluation and treatment. The July 9 appointment was rescheduled to July 13, but that appointment was rescheduled because claimant had a commitment that day he could not change. Claimant requested the appointment be rescheduled to a date after July 22. Claimant indicated he thought the appointment was rescheduled because he had to appear in court in Minnesota for a child support matter.

Claimant testified that on July 25, 2009, "I walk into the bathroom and by the time I tried to get up I couldn't get up, I couldn't made it, so that I fell down when I stand up. He fell down 'cause of the pain of the back lower."[6] Claimant went by ambulance to the emergency room at St. Catherine in Garden City. Claimant indicated he was then transported by airplane to Wichita, where he remained in the hospital for two or three days. He indicated that at the time, he could not move his left leg. Claimant indicated that while in Wichita, it was recommended he have an operation. He also indicated he was discharged when respondent refused to pay for his medical treatment.

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[4] Ms. Foerster was formerly with the law firm of McCullough, Wareheim & LaBunker, P.A.

[5] Ms. Sanfilippo's employer and position were never identified in the record. The Board assumes she worked for respondent.

[6] R.H. Trans. at 24.

Claimant testified that when he traveled to and from Minnesota he laid down on the back seat of his friend's vehicle. He admitted he did not attempt to contact respondent before going to St. Catherine or before he was transported to Via Christi in Wichita. However, he contacted his attorney after he arrived at Via Christi. An email dated July 27, 2009, from Ms. Foerster to Ms. Sanfilippo and Mr. Wurst stated claimant went to the emergency room at St. Catherine and was later transferred to Via Christi in Wichita. The email indicated claimant believed the surgery was needed as a result of his work injury. The email also requested authorization for the medical treatment provided and that a treating physician be authorized.

While at St. Catherine on July 25, 2009, claimant was treated by Dr. Osama Ismael. The doctor testified:

> He came in via ambulance, complained of back pain. The problem started about three months ago. It's been getting worse, possible recent injury. He said at home, he sneezed and the pain got worse. Location of the pain in his back and that radiate to his leg. He has pain, paresthesia -- or numbness. And paresthesia means, like, he cannot move it. And described the pain as sharp and moderate in intensity.
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> Okay. The pain got worse with movement and got better if he remains still. Review of system, it was pretty much negative. And he did have a prior back injury he stated here. Does not take any medication, does not smoke, does not drink. His exam, pretty much negative, except for his back -- he has back tenderness and spasms. And he has neuro deficit. He's unable to move his leg and unable to feel it.[7]

Dr. Ismael diagnosed claimant with acute sciatica on the right side and authorized a transfer of claimant to Wichita. He testified that applying a trauma protocol in which he was trained, it was medically necessary to move claimant to a higher facility. The doctor indicated he had no choice in the matter.

Dr. Ismael indicated he asked claimant to move his leg and tested it by pricking it with a needle. He did not order an MRI because that would have wasted six or seven hours. The doctor ordered lumbar x-rays, which were normal. A CT scan of claimant's head ordered to rule out a stroke was negative.

St. Catherine records, under accident information, noted claimant injured his back, but the exact details and time were unknown. Under accident type, "WC" was listed and under comments was "DR HUNSBERGER IS WORKCOMP DR FOR TYSON."[8]

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[7] Ismael Depo. at 7.

[8] *Id.*, Ex. 1.

On July 29, 2009, Mr. Wurst emailed Ms. Foerster indicating another appointment was scheduled for claimant to see Dr. Eyster on August 5, 2009. In an August 4, 2009, email, Ms. Foerster indicated claimant was changing attorneys and would not keep the August 5 appointment with Dr. Eyster. Ms. Sanfilippo responded in an August 5 email that because of the many cancellations, Dr. Eyster would not see claimant.

Orthopedic surgeon Dr. R. Sean Jackson initially saw claimant on November 1, 2010, for back and left leg pain. The doctor indicated he reviewed an MRI taken at Via Christi on July 26, 2009, which showed severe spinal stenosis at L4-5 with a left-sided disc protrusion. A history taken from claimant noted that surgery was recommended by a neurosurgeon at Via Christi, but was never performed because workers compensation would not approve it.

Following a second MRI, Dr. Jackson performed a laminectomy at L3-4 and L4-5 with a left L4-5 microdiskectomy on March 23, 2011. The doctor provided follow-up care including visits on April 5 and July 25, 2011, and August 6 and October 1, 2012. Dr. Jackson testified he asked claimant why he waited so long between July 25, 2011, and August 6, 2012, to make an appointment and claimant indicated he tried several times to make an appointment, but was told the doctor was too busy. Dr. Jackson indicated that was not accurate. He testified claimant was very dramatic with regard to his pain. The doctor testified, “But I guess somebody who really was having problems functionally and was in that amount of pain and continued to have problems I guess I just don’t see them go away for a year.”[9]

Dr. Jackson did not recall claimant mentioning an incident where he sneezed at home and suddenly had severe back pain. The doctor testified he did not think the sneeze caused claimant’s disk herniation, as claimant’s back and left leg pain preceded the sneezing incident. However, claimant’s exacerbated symptoms were related to the sneeze.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[9] Jackson Depo. at 20.

K.S.A. 2008 Supp. 44-510h(a) states:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2008 Supp. 44-510h(b)(2) states:

> Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

K.S.A. 44-510j(h) states, in part:

> If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.

In *Saylor*,[10] the Board found that Westar was liable under K.S.A. 44-510j(h) for Saylor's unauthorized medical expenses because Westar knew about the work-related injury, but failed to provide medical treatment for Saylor. The Kansas Supreme Court stated:

> Like the Court of Appeals, we must find that there was substantial competent evidence to support the Board's finding that Westar had knowledge of Saylor's work-related injury on February 6, 2006, and that Westar refused or neglected to provide medical treatment for that injury. That factual finding triggers the application of K.S.A. 44-510j(h), rendering Westar liable for the cost of Saylor's knee replacement surgery.[11]

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[10] *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 256 P.3d 828 (2011).

[11] *Id.* at 623-24.

In *Thompson*,[12] the Kansas Court of Appeals cited *Saylor* and stated:

> The final issue raised by Hasty Awards/Continental Western in this appeal pertains to the Board's award of $751.18 for an unpaid hospital bill incurred when Thompson twice visited an emergency room in November 2007. Both visits occurred during hours when the doctors' offices were not open. Thompson went to the emergency room with symptoms she believed were related to a heart attack. Thompson felt her shoulder blades cramping and tightening and her lungs closing off. In describing the pain, Thompson testified, "It just feels like somebody's grabbing your spine and pulling your rib cage. You can't breathe and it's just excruciating." Thompson did not feel that she could wait until the following morning to consult a doctor about the pain.
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> The ALJ found the hospital expenses were unauthorized medical expenses, noting:
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> > "The claimant submitted a bill for an outstanding balance of $751.18 from Anderson County Hospital. The claimant said she went to the hospital's emergency room in November 2007 because of pain between her shoulder blades. She said she went there in an evening because the pain was so severe she did not think she could wait until the next day to contact the respondent about seeing the authorized physician. There were no medical records or other testimony about this emergency room visit. The claimant's injuries in this case were rather minor 'strain/sprains.' Without more evidence to support the need for emergent treatment, the court considers this treatment obtained without authorization or approval, and the respondent's liability for such treatment is limited to a total of $500, K.S.A. 44-510h."
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> The Board reversed the ALJ's determination, finding that Thompson's testimony established an emergency warranting prompt medical attention. The Board provided no authority or reasoning for its position. On appeal, Hasty Awards/Continental Western contend that the Board's award of the hospital bill was contrary to K.S.A. 2010 Supp. 44-510h. In response, Thompson contends that emergency care is implied by the employer's affirmative obligation to "provide the services of . . . such medical, surgical and *hospital* treatment . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury." K.S.A. 2010 Supp. 44-510h(a). (Emphasis added by Kansas Court of Appeals.)
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> Although K.S.A. 2010 Supp. 44-510h(a) establishes an employer's general duty to provide medical care for an injured employee, there is no provision requiring an employer or an employer's insurance carrier to pay for the medical expenses

[12] *Thompson v. Hasty Awards, Inc.*, No. 106,359, 2012 WL 1970241 (Kansas Court of Appeals unpublished opinion filed May 25, 2012).

incurred solely at the employee's discretion. To the contrary, K.S.A. 2010 Supp. 44-510h(b)(2) states:

> "Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500." K.S.A. 2010 Supp. 44-510h(b)(2).

In *Saylor*, the Kansas Supreme Court affirmed the Board's compensation award for unauthorized medical expenses that exceeded the $500 limit because the employer possessed knowledge of the work-related injury but provided no medical care. 292 Kan. at 623, 256 P.3d 828. The result reached by the *Saylor* court was warranted by K.S.A. 44-510j(h). ("If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.") Here, however, Thompson was provided with health care by her employer. Thompson has made no allegations that the health care provided by her employer was inadequate. The Act makes no other provision for emergency treatment other than to charge the first $500 of such treatment to the employer under K.S.A. 2010 Supp. 44-510h(b)(2). Consequently, the Board erred, as a matter of law, in authorizing compensation for the unauthorized hospital bill in excess of the $500 limit provided by K.S.A. 2010 Supp. 44-510h(b)(2).

The Board's findings related to Thompson's neck injury are affirmed; however, we reverse the award for Thompson's unauthorized emergency room treatment in excess of the $500 allowed by statute.

The relevant facts of this claim more closely resemble the facts of *Thompson* than *Saylor*. Respondent authorized treatment for claimant and arranged an appointment with Dr. Baughman on April 1, 2009, but claimant did not keep the appointment. Respondent authorized treatment with Dr. Hunsberger and after becoming dissatisfied with him, claimant missed a June 15, 2009, appointment. Respondent agreed to provide another treating physician and claimant chose Dr. Eyster from a list of three physicians provided by respondent. An appointment was scheduled for July 13, 2009, which claimant cancelled. Prior to calling an ambulance to go to St. Catherine, claimant made no attempt to contact respondent. Nor did he attempt to contact respondent before being transported by air ambulance to Via Christi. Claimant was provided adequate health care by respondent. The Board denies claimant's request that respondent be ordered to pay claimant's outstanding medical expenses in the amount of $25,030.97.

CONCLUSION

Claimant was provided with adequate health care by respondent and, therefore, claimant's request that respondent be required to pay claimant's outstanding medical expenses in the amount of $25,030.97 is denied.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[13] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the February 19, 2014, Award entered by ALJ Fuller, except as follows:

The record does not contain a filed attorney fee agreement between claimant and his attorney, Stanley R. Ausemus. The administrative file contains an attorney fee agreement between claimant and his former attorney's law firm, McCullough, Wareheim & LaBunker, P.A. (McCullough). McCullough filed an attorney fee lien on August 10, 2009. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel, Mr. Ausemus, desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval. The ALJ shall then determine the attorney fees to which McCullough and Mr. Ausemus are entitled.

IT IS SO ORDERED.

Dated this ____ day of August, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

[13] K.S.A. 2013 Supp. 44-555c(j).

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Honorable Pamela J. Fuller, Administrative Law Judge